SUBMITTED Apr 9-

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927

No. 403

JERRY R. McCOY, PETITIONER,

vs.

A. S. J. SHAW, AS STATE AUDITOR OF THE STATE OF OKLAHOMA, AND THE PURE OIL COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Remedy at Law

PETITION FOR CERTIORARI FILED JULY 28, 1927

CERTIORARI GRANTED OCTOBER 31, 1927

(32,855)

( )

SUPREME COURT OF THE UNITED STATES

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IN SUPREME COURT OF OKLAHOMA

Case-made from District Court of Oklahoma County—Filed May 13, 1926

[File endorsement omitted.]

In District Court of Oklahoma County, State of Oklahoma

No. 48423

Jerry R. McCoy, Plaintiff,

vs.

C. C. Childers, as State Auditor of the State of Oklahoma, and The Pure Oil Company, a Corporation, Defendants

Petition—Filed October 20, 1925

Comes now the plaintiff and for cause of action against the defendants, states and alleges:

I

That the said defendant, C. C. Childers, is the duly elected, qualified and acting State Auditor of the State of Oklahoma and The Pure Oil Company is a corporation organized, chartered and existing under and by virtue of the laws of the State of Ohio, but duly authorized to transact and is transacting business in the State of Oklahoma.

[fol. 7] II

That said plaintiff, Jerry R. McCoy, is a member of the Chickasaw Tribe of Indians in the State of Oklahoma, formerly Indian Territory, and duly enrolled as a member of said Tribe or Nation of Indians as having one-fourth degree of Indian blood. That under and by virtue of the treaties and agreements and the supplements thereto, made

and entered into by and between the United States and the Chickasaw Nation or Tribe of Indians, as well as the Acts of Congress relating thereto, the said lands of the said Chickasaw Nation or Tribe of Indians were allotted and divided in severalty among the members of said Tribe so as to give to each member of said Tribe a separate portion and parcel of the said land. The said lands so allotted and conveyed to the several members thereof to vest in said member, to whom the same was so allotted, in severalty and to exclude the said Tribe or Nation and all of the other members of the said Tribe from any interest in such land so allotted in severalty to such member thereof. That under said agreements and Acts of Congress the said Jerry McCoy as such member of said Tribe received and there was allotted to him as his share and distributive portion of the said lands of said Tribe or Nation of Indians the following described real estate situated in Carter County, State of Oklahoma, to-wit:

South Half of the Southwest Quarter of Section Fourteen (14); East Half of Northeast Quarter of Northeast Quarter of Section Twenty-two (22) and the North Half of the North Half of the Northwest Quarter of Section Twenty-three (23), Township Four (4) South, Range Three (3) West; as surplus, and East Half of Northwest [fol. 8] Quarter and North Half of Southwest Quarter of Section Fourteen (14), Township Four (4) South, Range Three (3) West, as homestead,

and by reason of said Acts and agreements mentioned above, the said Jerry R. McCoy became and is the sole and exclusive owner thereof and a patent, duly conveying the said land to said Jerry R. McCoy, designated as surplus above, has been duly issued and delivered to him, being executed by the last executive of said Tribe on the 23rd day of March, 1907, and also a patent duly conveying to the said Jerry R. McCoy the portion of said lands designated above as homestead, has been duly issued and delivered to him, being executed by the last executive of said Tribe on the 21st day of March, 1907, all of which was done pursuant to and in conformity with the said agreements and Acts of Congress aforesaid and both of which said patents were duly approved by the Secretary of the Interior.

III

That as provided in the said agreements and Acts of Congress mentioned above, all of the said lands are non-taxable and shall remain non-taxable so long as the title remains in the said Jerry R. McCoy, not to exceed, however, twenty-one years from the said respective dates of said patents. That said title to said lands still remains in said Jerry R. McCoy and has never passed out of him and he is now the sole and exclusive owner thereof.

IV

That oil has been found and produced under and from the said lands of the said plaintiff described above, com-[fol. 9] mencing several years prior to the institution of this action and is still being so found and produced under and from said premises.

V

That the State of Oklahoma has enacted certain laws providing for the payment of certain taxes on the said oil so produced from all lands in the State of Oklahoma, commonly known as a gross production tax; and the said laws of the State of Oklahoma, as is provided in said Acts and as the same is construed by the Courts of last resort of the said State, provide that the said gross production tax on the said oil so produced is an ad valorem tax and therefore a tax upon the value of such land and the substances thereof.

VI

That therefore such tax so attempted to be assessed and levied upon the said oil so produced from the lands of the said plaintiff is contrary to and in violation of the said laws of the United States as contained in the said agreements and Acts of Congress mentioned above and the exemption from such taxation as contracted with the said plaintiff and guaranteed to said plaintiff under the said agreements and Acts of Congress mentioned above, the fulfillment of which said agreements was and is sanctioned by Congress and guaranteed to the said plaintiff.

VII

That heretofore and during the minority of the said plaintiff there was duly made and executed and delivered to the said defendant, The Pure Oil Company, a corpora- [fol. 10] tion, a certain — upon the said lands of the said plaintiff for the purpose of prospecting for and producing oil from the lands of the said plaintiff, and the defendant, The Pure Oil Company, is now producing oil from the said premises and has been producing oil therefrom as set forth above as the lessee of said plaintiff.

VIII

That under the said laws of the State of Oklahoma with reference to said gross production tax on oil as is provided in the said laws and as the same are construed by the courts of last resort of said State, the said tax upon the said production of the said oil is a property or ad valorem tax upon the mining business as a going concern and is a payment of all taxes "upon any property rights attached to or inherent in the rights to said minerals, upon leases for the mining of * * * petroleum, or other crude oil or other mineral oil * * * upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil * * * and actually used in the operation of such well * * *; and also upon the oil * * * hereinbefore mentioned, during the tax year in which the same is produced, and upon any investments in any of the leases, rights, privileges, minerals or property hereinbefore * * * mentioned or described."

Your petitioner would further show that he has not now and has never had, any property, improvements, appliances or machinery of any kind whatsoever upon the said [fol. 11] premises in connection with the production of oil therefrom but that the said lessee solely and exclusively mines and produces the said oil therefrom and simply pays to the said plaintiff his said proportionate part of said oil without expense, cost or charge to the said plaintiff. That as is contemplated by the said laws of the State of Oklahoma with reference to said gross production tax and as

the same is construed by the Supreme Court of said State, the payment of said three per cent of said gross production of said oil as such tax is intended and contemplated as the payment of the property or ad valorem tax, not only upon the said oil produced from the said premises but upon all of the other said property and property rights metioned above, including the said machinery, appliances, etc. That therefore the said lessee in paying three per cent of its said seven-eighths (⅞) of the said gross production of said oil from the said premises is paying not only upon the said oil but also upon all of the other said property and property rights owned by the said lessee and set out above, whereas the said lessor, owner of the land, is paying three per cent of the gross part of the said oil received by him in payment of his said tax upon the said oil and nothing more. That as heretofore stated it is the contemplation of the said Act, and as the same is construed by the Supreme Court of the said State, that the said three per cent of the total gross amount of the oil produced from the said premises is intended as a payment of the tax not only upon said oil but upon the said mining industry as a plant or going concern and that therefore, inasmuch as the said plaintiff has no property upon the said premises except being the owner [fol. 12] of the land, having acquired the same as set forth above, and inasmuch as the said lessee does have other property and property rights and a plant or going concern with machinery and appliances for the production and handling of the said oil that to require this said plaintiff to contribute three per cent of the gross portion of his said oil toward the payment of the said tax is a taking by the State of the property of this plaintiff to pay the tax of the said lessee without compensation to the said plaintiff and is also a depriving of the said plaintiff of his said property without due process of law and is also a denial to the said plaintiff of the equal protection of the law and is also imposing upon the said plaintiff a tax and burden which is not uniform among the people of the State obtaining oil from beneath the surface of the earth and is also a discrimination in said taxation laws against this said plaintiff, all of which is contrary to and in violation of the Constitution and laws of the United States as well as the Constitution and

laws of the State of Oklahoma and is therefore void and unenforcible as against this said plaintiff.

IX

That the said gross production tax law of the State of Oklahoma in truth and in fact also exempts the said royalty interest of the said plaintiff from such gross production tax but the said State Auditor erroneously rules, finds and holds that the said royalty interest of the said plaintiff is not so exempted but that the same is subject to said tax and is attempting to enforce the collection thereof by his said orders and actions herein mentioned and set forth.

[fol. 13] The plaintiff would further show that he is the owner of valuable real estate and other property in Oklahoma County, Oklahoma and as is provided by the said law of the State of Oklahoma, mentioned above, the said tax is made a lien upon all the property of the said plaintiff and the same is therefore apparently a cloud upon the title to the said real estate and other property of the said plaintiff and there is no means or method of removing such cloud except by this action as the said lien is so attempted to be made a lien in favor of the State of Oklahoma and this said plaintiff could not maintain an action against the said State to remove such cloud. That such lien on said property is invalid and is not due process of law as against this plaintiff.

XI

That under the said laws of the State of Oklahoma, the State Auditor of the said State is charged with the duty of collecting the said gross production tax upon the said oil produced from the lands in the said State and is authorized by the said laws of said State that in case the owner of the said land fails to pay his proportionate part of the said gross production tax upon the oil so produced from said lands that then the State Auditor of the State of Oklahoma may order the lessee or producer of the said oil from the said lands to so pay such proportionate part of such gross production tax upon the said oil which the owner of the said land should pay; that the proportionate part of the oil to be delivered by the said lessee or producer of the said oil to the owner of the land is commonly known and

[fol. 14] spoken of as the royalty of the said owner of said land and is deliverable and payable to the said owner of the said land. That under and by virtue of the said oil and gas lease under which the said defendant, The Pure Oil Company, is producing oil from the lands of the said plaintiff, it is provided that the said The Pure Oil Company shall pay and deliver to the said plaintiff one-eighth part thereof as the royalty or proportionate part of the said plaintiff as the owner of such land, as the consideration to be paid by the said lessee, The Pure Oil Company, for the privilege of exploring for and producing said oil from said lands. It is further provided by the said laws of the State of Oklahoma that when the said lessee or producer of said oil is notified by the State Auditor to pay the said proportionate part of the said tax which should be paid by the said lessor or owner of said land, that then the said lessee or producer of said oil may withhold a sufficient quantity of that part of the oil due or which may become due to the owner of said land to pay the tax of the said lessor, owner of the said land.

XII

That the said State Auditor of the State of Oklahoma is wrongfully and unlawfully and in violation of the laws of the United States, claiming that the said proportionate part of the said oil due and deliverable to the said plaintiff is subject and chargeable with the said gross production tax as provided by the laws of the State of Oklahoma and the said tax not having been paid by the said plaintiff as the owner of said land, the said State Auditor of the State of Oklahoma has notified the said The Pure Oil Company as the lessee, producer of the said oil from the said lands of the said plaintiff, to withhold from the proportionate part [fol. 15] of the said oil due and which may become due and deliverable to the said plaintiff until such sufficient quantity of the oil of the said plaintiff has been withheld to pay the said gross production tax in the sum of about $1050.00. The said plaintiff alleges that the said action of the State Auditor in so attempting to order the withholding by The Pure Oil Company of any of the oil of the said plaintiff for the purpose of paying the said gross production tax or any other tax or for any other purpose, is without authority

of law and is contrary to and in violation of the laws of the United States and that therefore the said State Auditor and his successors in office should be permanently enjoined from thus unlawfully and wrongfully interfering with the rights of this said plaintiff and attempting to impose upon this said plaintiff said unjust unlawful and void tax and the said defendant, The Pure Oil Company, should be commanded to ignore the order of the said State Auditor, and relieved from any duty or supposed duty to comply with the same, as well as relieved from any liability for ignoring such order. That unless the said State Auditor and his successors in office are so permanently enjoined as aforesaid from attempting to collect any of the said tax upon the proportionate part of the said oil due and deliverable to this said plaintiff that the said State Auditor and his said successors in office will so continue without authority of law and in violation of the said laws of the United States to attempt to impose upon this said plaintiff and his said proportionate part of said oil the said unjust, unlawful and void tax, all of which is and will be in violation of the [fol. 16] rights, immunities, exemptions and privileges guaranteed this said plaintiff under and by virtue of the said agreements and Acts of Congress, and other laws of the United States as set forth herein.

XIII

Plaintiff further alleges that the said purported tax upon his proportionate part of the said oil is unjust, unlawful and void and that to attempt to enforce the same against this said plaintiff violates the rights of the said plaintiff and imposes unlawful and unjust burdens and charges upon this said plaintiff in freeing himself and his property from the said unjust and unlawful and void claims of such taxation and for that purpose it will be necessary for the said plaintiff to employ attorneys and bear other unjust and unlawful burdens, costs and charges and the plaintiff will therefore suffer continuing irreparable damage and injury and the said plaintiff is also without adequate remedy at law for like reasons.

Wherefore: premises considered, plaintiff prays that the said C. C. Childers as State Auditor of the State of Okla-

homa, and his deputies, employees and agents and also his successors in office and their deputies, employees and agents, be permanently and eternally enjoined and forbidden from collecting or attempting to collect any tax from the said plaintiff on the proportionate part of the said oil of the said plaintiff so produced from the lands of said plaintiff and that the said order so heretofore made by the said State Auditor to the said The Pure Oil Company to withhold any portion of the said oil of the said plaintiff be forever abrogated, nullified and set aside and that the [fol. 17] said The Pure Oil Company be ordered and directed by this Court to ignore the said order of the State Auditor heretofore made as well as any orders which may be hereafter made by said State Auditor to withhold any portion of the oil due and deliverable or which may become due and deliverable to the said plaintiff on account of any taxes or taxation whatsoever and that the said plaintiff have all such other, further, general, legal and equitable relief as may be proper in the premises; and that he be granted a temporary injunction pending final hearing herein.

(Signed) Rainey & Flynn, Calvin Jones, Attorneys for Plaintiff.

Duly sworn to by Jerry R. McCoy. Jurat omitted in printing.

[fols. 18-21] [File endorsement omitted.]

[fol. 22] In District Court of Oklahoma County

[Title omitted]

Motion to Dismiss for Want of Equity—Filed November 7, 1925

Comes now, C. C. Childers, State Auditor of the State of Oklahoma, defendant herein, and moves the Court to dismiss the above entitled cause for want of equity for the reason that the Bill of Complaint filed herein does not state

facts sufficient to entitle the plaintiff to the relief prayed for, or to any relief.

C. C. Childers, State Auditor, State of Oklahoma. George F. Short, Attorney General. (Signed) V. P. Crowe, Assistant Attorney General.

[fol. 23] [File endorsement omitted.]

[fol. 24] In District Court of Oklahoma County

[Title omitted]

Amended Motion to Dismiss—Filed December 14, 1925

Comes now George F. Short, the duly elected, qualified and acting Attorney General of the State of Oklahoma, appearing in behalf of and upon the request of C. C. Childers, State Auditor of the State of Oklahoma, defendant herein, and admitting, solely for the purposes of this motion, every allegation of ultimate fact contained in the petition of the plaintiff, respectfully shows to this Honorable Court as follows:

I

That the taxing laws of the State of Oklahoma, affixing a tax upon the gross value of oil produced from under lands within said state, being Section 9814, Compiled Oklahoma Statutes, 1921, as the said laws are construed by the court [fol. 25] of last resort of said state, create in said tax a commutation of the general ad valorem property tax upon certain species of personal property; but said taxing laws do not, in words or intendment, purport to include the general ad valorem tax, if any, upon the land from under which said oil is produced, or interest of the nature of real property in said lands.

That the said laws, in affixing the said gross production tax in the manner aforesaid, do not conflict; with the provisions of the Curtis Act of June 28, 1898, (30 Stat. at L. 495, ch. 517); with the provisions of the Atoka Agreement of April 23, 1897, adopted June 28, 1898 and ratified August 24, 1898 (30 Stat. at L. 495, ch. 517, sec. 29); with the pro-

visions of the Choctaw Chickasaw Supplemental Agreement of July 1, 1902, ratified September 25, 1902, (32 Stat. at L. 641, ch. 1363); with the provisions of Act of Congress of April 21, 1904 (33 Stat. at L. 189, ch. 1402); with the provisions of Act of Congress of March 3, 1905 (33 Stat. at L. 1048, ch. 1479); with the provisions of Act of Congress of April 26, 1906 (34 Stat. at L. 137, ch. 1876); with the provisions of Act of Congress of May 27, 1908 (35 Stat. at L. 312, ch. 199); or with the provisions of any other act of Congress of the United States enacted within the grant of power to said body by the Federal Constitution.

III

That the said laws, affixing said gross production tax in the manner aforesaid, do not purport to affix a tax upon any business or occupation but solely upon lawfully taxable personal property, appraised upon the basis of its value for the use to which it is put.

[fol. 26]

IV

That neither the said laws, affixing said gross production tax in the manner aforesaid, nor the provisions of Chapter 20, Session Laws of Oklahoma, 1925, purport to affix a tax upon any property which tax shall be ultimately chargeable to other than the owner of such property.

V

That said laws, affixing said gross production tax in the manner aforesaid, and Chapter 20, Session Laws of Oklahoma, 1925, do not purport to unlawfully take any property without compensation to the owner thereof, contrary to the provisions of Amendment V., to the Federal Constitution or Section 23 of Article II., or Section 24 of Article II., of the Constitution of Oklahoma.

VI

That said laws, affixing said gross production tax in the manner aforesaid, and Chapter 20, Session Laws of Oklahoma, 1925, do not purport to take the property of any

person without due process of law, contrary to the provisions of Amendment V., or Amendment XIV., to the Federal Constitution, or Section 7 of Article II., of the Constitution of Oklahoma.

VII

That said laws, affixing said gross production tax in the manner aforesaid, and Chapter 20, Session Laws of Oklahoma, 1925, do not purport to deny to any person within the jurisdiction of the State of Oklahoma the equal protection of the laws, contrary to the provisions of Amendment XIV., to the Federal Constitution.

[fol. 27]

VIII

That said laws, affixing said gross production tax in the manner aforesaid, and Chapter 20, Session Laws of Oklahoma, 1925, do not purport to create a system of taxation which grants any special privilege, right or immunity to any person or class of persons, contrary to the provisions of Amendment XIV., to the Federal Constitution, or Section 51 of Article V., of the Constitution of Oklahoma; nor do they purport to impose any tax which shall not be uniform upon the same class of subjects contrary to the provisions of Section 5 of Article X., of the Constitution of Oklahoma; nor to exempt any property from taxation contrary to the provisions of Section 50 of Article V., of said Constitution.

IX

That the said laws, affixing said gross production tax in the manner aforesaid, and Chapter 20, Session Laws of Oklahoma, 1925, do not create any situation contrary to the provisions of the Constitution of the State of Oklahoma, or the Constitution of the United States, or any Act of Congress lawfully enacted in conformity with any grant of power to Congress.

X

That the said laws, affixing said gross production tax in the manner aforesaid, do not purport to exempt the interest of the plaintiff, in the oil produced from under his

land, from taxation, nor does said Chapter 20, Session Laws of Oklahoma, 1925, purport so to do.

[fol. 28]

XI

That the action of the State Auditor in proceeding to the collection of the said gross production tax from oil in which plaintiff has an interest, as alleged in the petition is not in conflict with any provision of the Constitution of the United States or of the State of Oklahoma, or of any valid law or part of law enacted under either of said instruments.

XII

It is further shown that said laws, affixing the said gross production tax as aforesaid specifically include within their terms and authorize the collection of said gross production tax from the class of property owned by plaintiff, from the class of persons to which plaintiff belongs and in the manner alleged in the petition.

XIII

That the Constitution of the State of Oklahoma authorizes the classification of persons and property for the purposes of taxation and the method of levying taxes as provided in said laws affixing said gross production tax as aforesaid, and said power is expressly reserved to the State by the Federal Constitution.

XIV

That there exists no valid exemption, in the Federal Constitution, the State Constitution, the laws of the United States, the laws of the State of Oklahoma, the theory of our form of government, or any recognized natural right of plaintiff, excluding him or his personal property from the form of tax provided by said gross production tax laws.

XV

[fol. 29] That the State of Oklahoma has ample power to levy the tax provided for by said gross production tax laws upon persons of the class to which plaintiff belongs and

property of the class of that alleged by the petition to be the subject of the attempted imposition of taxation by the State Auditor.

XVI

It is further shown that plaintiff has a speedy, efficient, ample and complete remedy at law, in the following: (a) Under the provisions of said gross production tax laws; (b) Under the provisions of Chapter 20, section 3, Session Laws of Oklahoma, 1925; (c) Under the provisions of Section 9971, Compiled Oklahoma Statutes, 1921.

XVII

That the petition fails to show wherein plaintiff will suffer irreparable injury should the injunctive relief be not granted.

XVIII

That the petition fails to state facts sufficient to entitle plaintiff to the interposition of equity by the granting of the injunctive relief prayed for, or to any relief.

Wherefore, in view of each and every of the premises, it is respectfully prayed that the cause be dismissed at the plaintiff's cost, that the defendant, C. C. Childers, State Auditor of the State of Oklahoma, be permitted to go hence, [fols. 30-32] and that this court make such order respecting the tender of the defendant, The Pure Oil Company, as may conform to law.

George F. Short, Attorney General, (Signed) V. P. Crowe, Leon S. Hirsh, Assistant Attorneys General, for the State Auditor.

[File endorsement omitted.]

In District Court of Oklahoma County

[fol. 33] [Title omitted]

Judgment—Filed December 23, 1925

Now on this, the 15th day of December, 1925, this cause coming on for hearing before the Court upon the motion to dismiss and the amended motion to dismiss filed by the defendant, C. C. Childers, which said motion and the amend-

ment thereof are treated as general and special demurrers and the Court, after hearing the argument of Counsel and being well and sufficiently advised in the premises, finds that the said motion and the amendment thereof, which are so treated as demurrers as aforesaid, should be sustained.

It is therefore ordered, adjudged and decreed by the Court that the said motion to dismiss and the amendment thereof, which are so treated as general and special demurrers aforesaid to the petition of the plaintiff, be and the same are hereby sustained and that the said petition [fol. 34] of the plaintiff be dismissed and he take nothing by this action, and that said defendants recover their costs herein expended.

To all of which action the plaintiff in open court duly excepts and also in open court prays an appeal to the Supreme Court of the State of Oklahoma and gives notice for such appeal to the Supreme Court of the State of Oklahoma, which is duly and properly entered in the proper records of this court as provided by law and the said plaintiff also asks and is given sixty days additional time within which to prepare and serve the case-made, the defendants to have ten days thereafter within which to suggest amendments thereto and the same to be settled and signed by the court upon five days written notice by either party to the other; and,

Whereas the State Auditor of the State of Oklahoma has requested the defendant, The Pure Oil Company, to withhold the sum of $1,054.63, the amount of tax claimed by the said State Auditor against the said plaintiff, as due on the 31st day of July, 1925, the said defendant, The Pure Oil Company, is hereby ordered to pay the said sum into this court to await the further order of this court and the final disposition of this cause upon appeal, should the same be appealed.

(Signed) Lucius Babcock, District Judge.

O. K.:
(Signed) George F. Short, Atty. Genl., by V. P. Crowe, Asst.

O. K.:
(Signed) Rainey & Flynn.

[fols. 35-49] [File endorsement omitted.]

[fol. 50] IN SUPREME COURT OF OKLAHOMA

17434

J. R. McCOY

vs.

C. C. CHILDERS et al.

Opinion by Riley, J.

JUDGMENT—April 5, 1927

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby affirmed.

Journal 13, page 146.

[fol. 51] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 17434

JERRY R. McCOY, Plaintiff in Error,

vs.

C. C. CHILDERS, as State Auditor of the State of Oklahoma, and THE PURE OIL COMPANY, a Corporation Defendants in Error.

OPINION—Filed April 5, 1927

Syllabus

1. Section 9814, Compiled Oklahoma Statutes, 1921, relating to a lien for gross production tax upon a royalty interest provides that "the amount of tax on the royalty

interest shall be a lien on such interest," and such a provision for such a lien on such interest is construed strictissimi juris and excludes a lien for such interest upon any other property, notwithstanding Section 9817, Compiled Oklahoma Statutes, 1921, which provides generally for the levy and collection of said gross production tax from the property, assets and effects of such persons, firm, association or corporation, and constitutes the tax a lien upon such property, and provides for a suit thereon.

2. Section 9814, supra, permits an aggrieved taxpayer of a gross production tax to pay such tax under protest and giving of notice, and the institution of an action at law to recover the same, and such a remedy is adequate, speedy, complete and exclusive.

Error from the District Court of Oklahoma County, State of Oklahoma

Honorable Lucien Babcock, Judge

Action by J. R. McCoy against C. C. Childers as State Auditor of the State of Oklahoma, and the Pure Oil Company, a corporation, to enjoin C. C. Childers as State Auditor, his deputies, employees and successors in office, from collecting or attempting to collect from the plaintiff in error his proportionate share of the gross production tax on his royalty due him from oil produced from allotted lands, and [fol. 52] to enjoin the defendant Pure Oil Company from withholding the portion of said oil from him, and to cancel the order made by the said State Auditor ordering the defendant Pure Oil Company to withhold from plaintiff his proportionate share of the oil on account of gross production tax levied. Motion by C. C. Childers to dismiss for want of equity, sustained. From which judgment plaintiff appeals. A. S. J. Shaw substituted as defendant in error. Judgment affirmed.

Affirmed.

Rainey, Flynn & Green & Anderson, Calvin Jones, for plaintiff in error.

George F. Short, Attorney General, V. P. Crowe, Assistant Attorney General, for defendants in error.

[fol. 53] RILEY, J.:

The parties appear here in the order as they did in the court below with the exception that by order of this Court, A. S. J. Shaw, in his official capacity, is substituted for C. C. Childers, the latter's term of office having expired on the 10th day of January, 1927, and the former having been elected and qualified and having assumed the duties and office of State Auditor on said date.

McCoy as plaintiff below sought an injunction against the defendant C. C. Childers as State Auditor, his deputies, employees, and successors in office, to prevent the levying and collection, or the attempt to levy and collect, from plaintiff McCoy his proportionate share of gross production tax upon oil produced by the Pure Oil Company and derived by him by reason of his royalty on his homestead and surplus allotments. It was alleged that plaintiff had theretofore leased his homestead and surplus allotments to the Pure Oil Company for the purpose of prospecting for and producing oil from said lands. It was also alleged that plaintiff was a one-fourth blood Chickasaw Indian, and that his described lands are non-taxable allotments under Acts of Congress and agreements between the Choctaw and Chickasaw Nations and the United States Government, and wherein it was provided that such lands should remain non-taxable so long as title remained in plaintiff not to exceed twenty-one years from date of patent; that said lands were so patented and that title so remains and that the twenty-one years have not expired. It was alleged that plaintiff McCoy is the owner of valuable real estate and other property in Oklahoma County, and that under the laws of the State of Oklahoma, the gross production tax is a lien upon all of the property of plaintiff and that the same constitutes a cloud upon the title of plaintiff on his other property throughout the State, and that there is no means or method of removing said cloud except by this action, inasmuch as the lien provided is in favor of the State. The petition further alleges that the defendant, State Auditor, is authorized, under the law, as construed by him, upon failure of plaintiff to pay his proportionate [fol. 54] part of the gross production tax, to make an order on the lessee to withhold from plaintiff his one-eighth royalty interest which may become due and payable until sufficient quantity of oil of plaintiff has been withheld to pay

said share of such gross production tax; that in fact such an order has been made and that oil is being withheld by the defendant Pure Oil Company in violation of plaintiff's rights.

It was not alleged, and it was not contended that the lands of plaintiff are now restricted against alienation, nor that the lease under which the oil in question was produced is a departmental lease, in any respect.

The defendant Pure Oil Company answered, setting forth that they held moneys derived from the sale of plaintiff's royalty under its lease and tendered said moneys into court for the benefit of the proper party.

The defendant, C. C. Childers, State Auditor, through the Attorney General, moved to dismiss the petition of plaintiff for want of equity, and upon a hearing of the motion of defendant to dismiss, the court treated the same as general and special demurrer and sustained the same dismissing plaintiff's action. From which judgment the plaintiff appeals.

The plaintiff in error urges for reversal of the cause the following propositions:

"Proposition No. 1. The District Court of Oklahoma County as a court of equity has jurisdiction of the matters involved herein.

"Proposition No. 2. The Gross Production Tax of Oklahoma is not applicable to the royalty interest of this plaintiff as the said oil is produced from the allotted lands of this plaintiff as a Chickasaw Indian and upon which allotment the tax exemption period under which said lands were allotted has not expired.

"(a) This royalty of the plaintiff is not taxable as oil for the reason oil is a part of the realty and the realty is expressly exempt.

"(b) This royalty is not taxable if considered as ordinary rents or produce from the land for the reason that a tax on rents or produce of the land is a tax on the land, the source from which the rents are derived and said land is expressly exempt.

"(c) This tax interferes with congressional legislation and the fulfillment of the contract and treaty obligations of the national government and is also a tax on a federal agency."

[fol. 55] The defendants urge the following grounds for sustaining the judgment rendered:

"1. Plaintiff in error has an adequate remedy at law, and, is, therefore, not entitled to equitable relief and the motion to dismiss for want of equity was properly sustained.

"2. The oil, upon which the tax in question was levied, when detached from the soil in which it was embedded becomes and is personal property and is subject to state taxation as any other personal property.

"3. The property, upon which the tax in question was levied, is not exempted from state taxation by the Constitution of Oklahoma or any of the laws of the State of Oklahoma.

"4. The property, upon which the tax in question was levied, is not exempted from state taxation by the Constitution of the United States or by any act of Congress or treaty with the Indians.

"5. The tax in question is not a tax upon a federal instrumentality, there being no Federal instrumentality involved in this case."

In determining the first proposition our attention is directed as to whether an adequate remedy at law is provided for plaintiff in error.

Section 9971, Compiled Oklahoma Statutes, 1921, provides as follows:

"In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the full amount of the taxes at the time and in the manner provided by law, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days, and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes until the final determination of such suit. All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein; if, upon final determination of any such

suit, the court shall determine that the taxes were illegally collected, as not being due the state, county or subdivision of the county, the court shall render judgment showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer shall pay to such person the excess and shall take his receipt therefor."

Thus by the general law it will be seen that it was the intention of the Legislature to provide an adequate remedy at law so that State Government might function without the burden of injunctive actions which might tend to prevent or restrain the collection of taxes to meet governmental needs.

[fol. 56] By special Act of the Legislature it is provided in Section 9973, Compiled Oklahoma Statues, 1921:

"Special Tax—Payment to State Auditor—Payments Under Protest.—None of the acts herein required to be done shall be enjoined by a court of equity, but any person aggrieved in any matter of collection, assessment or levy of any tax herein provided for shall pay the tax at the time and in the matter provided by law, except as stated in Section 2, Article 2-B, hereof, and at the time of payment shall file a written statement with the State Auditor, under oath, as provided in Section 10-11, Article 2-B, hereof, fully setting forth his complaint. The Auditor shall retain the payment as a special deposit to await the final decision on said complaint. And thereupon the same right of hearing and review shall be had upon said complaint as provided for herein in Section 10-11 of Article 2-B hereof."

Thus by special Act the remedy at law was provided for the recovery of a special tax, such as in the instant case, in the event it should be found the tax is in fact illegal. In addition, by the Act, the remedy by injunction previously available, was specifically taken away.

In Black, et al., v. Geissler, et al., 58 Okla. 335, 159 Pac. 1124, it was held that Section 4481, Revised Laws, 1910, authorizing injunction relief to restrain an illegal levy and the collection of a tax, was modified by Section 7, Chapter 107, p. 149, Session Laws, 1915, which latter Act provided an effectual remedy, and that the remedy so provided was plain, speedy, adequate and exclusive.

In the case of Tennesee V. Sneed, 96 U. S. 69, 24 L. Ed. 610, the Supreme Court of the United States had under consideration a statute similar to the one of Oklahoma and dealt with in the Black case, supra. The Supreme Court of the United States said:

"We think the regulation of the statute gave him an abundance of means of enforcing such right as he possessed. * * * A suit at law to recover money unlawfully exacted is a speedy, as easily tried and less complicated than a proceeding by mandamus. * * * No government could exist that permitted the collection of its revenues to be delayed by every litigious man or every embarrassed man, to whom delay was more important than the payment of costs."

Shelton v. Platt, 139 U. S. 591, 11 Sup. Ct. 646, 35 L. Ed. 273.

We, therefore, hold that this Court is committed to the doctrines that a statute which provided for the payment of taxes under protest and an action to recover same gives the taxpayer an adequate remedy at law and the same is exclusive.

[fol. 57] The plaintiff seeks to take himself from within the rule above stated by contending that the invalid lien imposed constitutes a cloud upon his property other than that from which the tax is drawn. He relies upon Shaffer v. Carter, 252 U. S. 36, 64 L. Ed. 445, the same being a case wherein a non-resident maintained an action to prevent the collection of a State income tax on the grounds that the income tax law imposed a lien upon the entire property of the taxpayer regardless of whether the income taxed was derived therefrom. It was there held:

"For removal of a cloud upon title caused by an invalid lien imposed for a tax valid in itself, there apears to be no legal remedy. Hence, on this ground at least, resort was properly had to equity for relief; and since the court of equity does not 'do justice by halves' and will prevent if possible, a multiplicity of suits, the jurisdiction extends to the disposition of all questions raised by the bill."

There the basis of equitable action was that the income tax itself was valid, but the law imposed a lien upon the entire property of the taxpayer irrespective of the fact

that a part of the property was not responsible for the production of the income taxed, therefore, the lien imposed on all the property was a cloud on that part of the property other than from which the income taxed was derived, hence invalid, and in the absence of an adequate relief at law, equity would afford a remedy.

If that rule is applicable here it is decisive of the contention. To determine the applicability of the rule we must inquire whether the lien imposed by the law providing for the gross production tax imposes a lien upon all of the property of plaintiff wherever situated and regardless of the fact that production of the oil is not derived from such property. The plaintiff's contention is based on Section 9817, Compiled Oklahoma Statutes, 1921, which provides in part:

" • • •such tax, interest and penalty shall constitute and remain a lien upon the property, assets and effects of such person, firm, association or corporation until paid, and may be recovered at the suit of the State in any court of competent jurisdiction of the County where any such property, assets and effects are located."

[fol. 58] We note that the word "all" is not used, and should the lien be made to apply to all of the property it would be by construction and intendment. Lien laws are strictly construed. We need not rely upon a strict construction for Section 9814, Compiled Oklahoma Statutes, 1921, of the same Act, provides in part:

"The tax hereby declared shall attach to and is levied on what is known as the royalty interest except such royalty interest of the State of Oklahoma, or such royalty interests as are exempt from taxation under the laws of the United States, and the amount of the tax on the royalty interest shall be a lien on such interest."

This provision negatives the contention of plaintiff that the tax in the instant case on plaintiff's royalty interest is a lien on his property in Oklahoma City and his other property throughout the State.

In the case of Muskogee Times-Democrat v. Board of County Commissioners of Muskogee County, 76 Okla. 188, this Court, in regard to statutory construction, said:

"Where there are two provisions of the statutes, one of which is special and particular and clearly includes the matter in controversy, and where the special statute covering the subject prescribes different rules and procedure from those in the general statute, it will be held that the special statutes applies to the subject-matter, and that the general statute does not apply."

We, therefore, hold that by Section 9814, supra, the lien for gross production tax on a royalty interest is a lien only on such interest, the tax and the lien imposed thereby in the instant case being only on the royalty interest and the attempt to enforce the same being only against the royalty interest the rule in the Shaffer case is not applicable.

It was intimated in the Shaffer case that the provisions of Section 9971, supra, relating to the method of paying of taxes under protest and bringing suit to recover the same applied only to ad valorem taxes, but in Johnson v. Boneparte, No. 17,159, — Okla. —, 249 Pac. 380, decided September 21, 1926, this Court held that said Section did not apply alone to ad valorem taxes, but likewise to any tax required to be collected by the County Treasurer and otherwise falling within the provisions of the Act, and the same [fol. 59] provisions were there held to extend to a special assessment made by a drainage district. The provisions are equally applicable to the payment of gross production tax. Nor must we extend such provision as to gross production by a strained construction, for by Section 9814, supra, it is provided:

" * * * that after such tax has been collected and distributed, or paid without protest, no complaint with reference to rate thereof shall be heard or considered."

Thus clearly it was intended said Section 9971, supra, should be applicable to gross production taxes. In addition Section 9973, supra, specifically provides for protest of a gross production tax paid to the State Auditor. We, therefore, hold that the remedy provided at law is adequate and exclusive.

The conclusion reached is decisive of the issue before us. The judgment of the trial court is affirmed.

Branson, C. J., Mason, V. C. J., Phelps, Lester, Clark, JJ., concur.

Harrison, Hunt, JJ., absent, not participating.

[fols. 60-68] Petition for hearing filed April 15, 1927, and amendment thereto, filed May 4, 1927 covering 6 pages omitted from this print. It was denied and nothing more by order May 10, 1927.

[fols. 69-71] Supersedeas Bond for $200.00, approved and filed July 2, 1927, omitted in printing.

[fols. 72 & 73] In Supreme Court of the United States

Stipulation of Portions of the Record to be Printed

The parties hereto hereby designate for printing under the supervision of the Clerk the following portions of the record to present the question involved, a complete transcript of which is being prepared for filing herein:

Petition of Plaintiff;
Motions to dismiss by State Auditor;
Judgment of the District Court of Oklahoma County thereon;
Opinion of the Supreme Court of the State of Oklahoma;
Refer to petition for rehearing and amendment thereto and the order denying the same, which order was made on May 10th, 1927;
Refer to bond;
Designation of portions of record to be printed.

It is hereby agreed by and between the parties hereto that the foregoing designation of portions of the record to be printed is adequate and sufficient for the presentation of the questions involved herein.

Robt. M. Rainy and Streeter B. Flynn, Attorneys for Petitioner.

Edwin Dabney, Atty. Gen'l, by J. Berry King, Asst., Alvin Richards, Attorneys for Respondents.

Endorsed on cover: File No. —. Oklahoma Supreme Court. Term No. —. Jerry R. McCoy, petitioner, vs. A. S. J. Shaw, as State Auditor of the State of Oklahoma, and The Pure Oil Company. Petition for writ of certiorari and exhibit thereto. Filed —— —, 1927. File No. —.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 31, 1927

The petition herein for a writ of certiorari to the Supreme Court of the State of Oklahoma is granted. And it is furthere ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.